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No. 83-2052

In The
Supreme Court of the United States
October Term, 1983

HANOCH TEL-OREN, in his capacity as father on behalf of the deceased, IMRY TEL-OREN, *et al.*,

Petitioners,

vs.

LIBYAN ARAB REPUBLIC, *et al.*,

Respondents.

HANOCH TEL-OREN, *et al.*,

Petitioners,

vs.

LIBYAN ARAB REPUBLIC, *et al.*,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL ASSOCIATION OF ARAB AMERICANS

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QUESTIONS PRESENTED

1. Whether the District Court erred in ruling that Plaintiffs' claims against the NAAA were insubstantial and unsubstantiated.

2. Whether the District Court erred in ruling that Plaintiffs claims were barred in their entirety by the statute of limitations.

3. Whether the District Court erred in ruling that Plaintiffs failed to establish jurisdiction under 28 U.S.C. § 1331.

4. Whether the District Court erred in ruling that Plaintiffs failed to establish jurisdiction under 28 U.S.C. § 1350.

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STATEMENT OF THE CASE

A. Material Facts

This case involves Plaintiffs' claims for damages arising out of an incident in the seemingly endless cycle of violence which has characterized the Israeli-Arab conflict since its inception. Plaintiffs allege that on March 11, 1978, 13 members of a faction of the Palestine Liberation

Organization ("PLO") engaged in a hostage-taking which was designed to gain the release of political prisoners in the custody of the Isaeli authorities. The tragic incident resulted in the death and wounding of a number of Israeli civilians. Plaintiffs seek redress in the federal courts of the United States for this particular paroxysm of Israeli/ Palestinian violence.

Plaintiffs did not allege direct involvement in the incident by the National Association Arab Americans ("NAAA"). Indeed, the record below made clear that NAAA condemned the incident. Motion to Dismiss the Complaint [hereinafter cited as "Motion"], Appendix to Brief in Opposition for Respondent National Association of Arab Americans [hereinafter cited as "Appendix II"] at 109. Instead, Plaintiffs alleged that the NAAA is legally responsible for the attack because it planned, conspired to commit, raised funds and procured arms, and "otherwise . . . acted in furtherance of this terrorist operation." Complaint at ¶61, Appendix IIA at 19-20. As the District Court found, Plaintiffs did not provide any factual basis for these broad and conclusory allegations. In its motion to dismiss the Complaint, therefore, the NAAA challenged Plaintiffs to demonstrate at least *some* factual basis for naming the NAAA as a defendant. Motion, App. IIB at 109, 137-39.

The NAAA had good reason to be surprised—indeed angered—at being named as a defendant in these actions and to demand a factual demonstration of the bases, if any, for Plaintiffs' action. The NAAA is a well-known and widely respected organization whose members are American citizens of Arab descent. Its primary purpose is to represent the two million American citizens of Arab

ancestry in matters relating to the United States' national and international interests and to fight institutionalized prejudice against Arab Americans. The NAAA has been warmly received by the American government. Indeed, it has received annual messages of appreciation and well-wishes from Presidents Ford, Carter, and Reagan.

On April 30, 1981, Plaintiffs responded to the NAAA's Motion. Consolidated Memorandum in Opposition to the Motion of NAAA to Dismiss the Complaints [hereinafter cited as "Response"], App. IIC, pp. 147 *et seq.* This Response confirmed the NAAA's conviction that Plaintiffs had no factual basis whatsoever to name the NAAA as a defendant. The Response specifically declined to substantiate its allegations, *id.* at 169, and merely repeated broad, conclusory and unsubstantiated allegations against the NAAA, *id.* at 166-67. Plaintiffs' Response undercut its own allegations against the NAAA by alleging that the bus attack was planned solely by the PLO and Libya, *id.* at 158, and by discussing the activity of the PLO and Libya at length with only marginal reference to the NAAA.

Instead of producing any factual support for the allegations in the Complaint, the Response disclosed that their "case" against the NAAA rested, in fact, on three alleged "facts" concerning Hisham Sharabi, a professor at Georgetown University and a past president of the NAAA. These "facts"—the *sole* basis for naming the NAAA as a defendant—are alleged to be as follows:

(1) The *Washington Post* on August 2, 1978—4½ months after the attack—reported that Professor Sharabi did not condemn *per se* the use of violence by the PLO in its struggle to regain a homeland for the Palestinian people. *Id.* at 160.

(2) Professor Sharabi is purported to have stated in an introduction to a book published in 1973 that "organized violence" and "armed struggle" were necessary parts of the Palestinian political struggle. Professor Sharabi is alleged to have made similar statements in a 1972 publiication. *Id.* at 165-66.

(3) Plaintiffs alleged that Professor Sharabi "was and remains a close personal friend of Yasar [sic] Arafat, leader of the PLO, and was and remains in close consultation with Arafat. Sharabi has actually been named as a possible member of a PLO government in exile." *Id.* at 160.

In short, the undisputed factual background presented to the District Court was clear: (1) there was no link between the NAAA and the March 11, 1978 bus incident; (2) Plaintiffs' subsequent pleadings before the District Court made clear that they had no basis whatsoever to support any of the allegations made against the NAAA in the Complaint; and (3) the sole basis for naming the NAAA as a defendant was the alleged political views and associations of Professor Sharabi.

B. The District Court's Decision

Judge Green ruled that there were three grounds for dismissal of the action. First, the claims against the NAAA (and against the Palestine Congress of North America (PCNA) and the Palestine Information Office (PIO)) were "clearly insubstantial," and that *these defendants "have not been connected to the claimed torts sufficiently to permit the action to proceed against them."* Appendix to Petition for Writ of Certiorari [hereinafter cited as "Appendix I"] at 124a, 125a (emphasis added).

Second, all of Plaintiffs' claims were barred by the one-year statute of limitations. *Id.* at 128a, 129a. Third, subject matter jurisdiction did not exist under either 28 U.S.C. §1331 (federal question) or §1350 (Alien Tort Statute) because the Plaintiffs failed to cite any statute, treaty, or other independent basis for a cause of action. *Id.* at 123a, 127a.

C. The Court of Appeals' Decision

The three judge panel for the District of Columbia Court of Appeals affirmed the dismissal in a *per curiam* opinion. App. IA at 2a, 3a. The opinion specifically referred to both the statute of limitations and the subject matter jurisdiction bases for the District Court's dismissal. *No part* of the District Court's holdings—including the dismissal of the actions as to the NAAA, the PCNA and the PLO on the grounds of the insufficiency of the allegations against them—was disturbed. The lengthy concurring opinions of Judges Edwards and Bork and the brief concurring opinion of Judge Robb each represent mere *dicta,* as none of the opinions represent the *court's* reasoning. The Petition so seriously mischaracterizes the opinions, however, that clarification is required.

Plaintiff's discussion of terrorism as a law of nations violation errs in two respects. First, it states that *both* Judges Edwards and Bork held that the instant alleged terrorism does not violate the law of nations. Petition at 7. While Judge Edwards did so state, Judge Bork did *not.* Judge Bork specifically declined to rule on whether the instant actions violated international law, declaring, "[t]here is, of course, no occasion here to state what international law should be." App. IA at 72a.

Second, Plaintiffs' Petition states that both Judges Bork and Edwards required "unanimity of international opinion" for a finding that terrorism violates international law. Petition at 7. Since Judge Bork did not reach the issue of what constitutes a violation of international law, neither did he reach the issue of degree of consensus required for a finding of a violation. To the extent that he discusses the issue, however, his comments make it clear that "unanimity" is not required; instead, dismissal was appropriate, in Judge Bork's view, because Plaintiffs claim "concerns areas of international law in which there is *litt'e or no consensus.*" App. I at 70a (emphasis added).

Judge Edwards also noted that the condemnation of terrorism is "not universal," as the Petition observed. Petition at 8. The immediately following sentence of Judge Edward's opinion, however, makes it clear that he also is *not* requiring unanimity: "Indeed, the nations of the world are *so divisely split* on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus." App. I at 46a (emphasis added). Judge Edwards merely followed the "general assent of civilized nations" standard which this Court enunciated in *The Paquete Habana,* 175 U.S. 677, 694 (1900).

Plaintiff's discussion of justiciability and the political question doctrine, Petition at 9, also misconstrues the nature of the concurring opinions. While Judge Robb's reliance on the doctrine is reasonably represented, Judge Bork's views are misrepresented. Judge Bork does discuss the doctrine and the possibility of determining the applicability of the doctrine to the instant case, but decides that "[s]uch a determination *is not necessary,*" App. IA at 62a (emphasis added), and appends that "[i]t is probably bet-

ter not to involve the political question doctrine in this case," *id.* at 63a n.8. Accordingly, the Plaintiff's Petition does not make it clear that only *one* judge (Judge Robb) relied on the political question doctrine in affirming the District Court's action.

ARGUMENT

The decisions of the District Court and the Court of Appeals are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The courts below properly dismissed Plaintiffs' action in its entirety as being barred by the statute of limitations, and accordingly the petitioned issues need not be reached.

Under the principles of *Erie R.R. v. Thompkins,* 304 U.S. 64 (1938), the District Court looked to District of Columbia law to determine which statute of limitations to apply to Plaintiffs claims. *Steorts v. American Airlines, Inc.,* 647 F.2d 194 (D.C. Cir. 1981). The court ruled (and Plaintiffs never disagreed) that D.C. Code § 12-301 provides the applicable statute of limitations. App. IB at 127a, 128a. The only dispute was whether the Plaintiffs' claims were governed by the one-year limit which Section 12-301(4) provides for "libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment . . ." or by the three-year limit which Section 12-30-(8) provides for causes of action "for

which a limitation is not otherwise specially prescribed . . . ."

The Plaintiffs' Complaint asserted five causes of action against the Defendants. Count I asserted a cause of action based on "the *intentional* torts of assault, battery, false imprisonment, intentional infliction of mental distress and/or intentional infliction of cruel, inhuman and degrading treatment . . . ." Complaint at ¶72, App. IIA at 22 (emphasis added). Assault, battery, and false imprisonment are specifically limited to a one-year statute of limitations by § 12-301(4), so the first three parts of this Count are expressly barred.

The two remaining parts of Count I are similarly barred. The allegations of "intentional infliction of mental distress" and "intentional infliction of cruel, inhuman and degrading treatment" do not state separate or distinct rights of action. Instead, these "causes of action" clearly arise out of the same conduct which allegedly constitutes the assault, battery, and false imprisonment. Thus, in Count I, Plaintiffs have done no more than assign two additional labels to that conduct. Since "the label" which a plaintiff applies to a pleading does not determine the nature of the cause of action which he states," *Aktiebolaget Bofors v. United States,* 194 F.2d 145, 148 (D.C. Cir. 1951), and "the statute of limitations . . . cannot be evaded by referring to [a] cause of action in some other terms," *Universal Airline v. Eastern Air Lines,* 188 F.2d at 393, 396 (D.D.C. 1951), the District Court ruled that all of Plaintiffs' Count I claim was time-barred. App. IB at 128a.

Similarly, Counts II through V of the Complaint are also barred by Section 12-301(4). In Counts II through

IV, Plaintiffs merely restate the substantive allegations of Count I and then supply yet another set of labels to those intentional tort claims. Count V, which also repeats the same Count I substantive allegations, purports to state a claim for conspiracy to commit the torts alleged in Counts I through IV. Complaint at ¶¶ 73-148, App. IIA at 22-37.

As noted above, a court must examine the *substance* of a party's claims to determine which statute of limitations to apply. The substance of the Count II through V claims is clearly identical to that of the claims in Count I —intentional torts. Like Count I, therefore, Counts II through V are subject to the one-year limitations period of D.C. Code § 12-301(4) and accordingly are time-barred. The words of the District Court in so ruling speak for themselves: "As to Counts II-V, alleging various torts claimed to be defined by international law, the same analysis would apply. Substantively, they are no different from the claims in Count I; they simply attempt to state a cause of action under different sources." App. IB at 129a.

As stated earlier, the *per curiam* opinion specifically referred to the statute of limitations issue in affirming the dismissal of the Complaint. The holding of the District Court regarding the statute of limitations bar was not disturbed in any way; none of the three concurring opinions reached the issue. Accordingly, it was the *undisturbed* holding of the District Court that Plaintiffs' Complaint was barred *in its entirety* by the statute of limitations.

The Plaintiffs have virtually conceded that their action is barred by the statute of limitations. While Plaintiffs appealed the statute of limitations ruling to the Court of Appeals, App. IIE at 300-307, the Petition contains not

a single mention of the statute of limitations. This omission, we submit, effectively concedes that dismissal of the Complaint as time-barred was correct, and compels this Court to affirm the judgments below without reaching the petitioned issues.

2. The courts below properly dismissed Plaintiffs' Complaint against the NAAA as being insubstantial and unsubstantiated, and accordingly the petitioned issues need not be reached insofar as they relate to the NAAA.

Plaintiffs' Complaint alleged both tortious conduct and conspiracy to commit torts on the part of the NAAA. Complaint at ¶¶ 63-148, App. IIA at 20-37. Since Plaintiffs never demonstrated direct NAAA involvement in the March 11 incident, conspiracy appears to be the heart of their case. Their conspiracy allegations against NAAA, however, are as deficient as their tortious conduct allegations. The law is clear that "it is not enough merely to state that a conspiracy has taken place." 2A Moore's Federal Practice ¶ 8.17[5], at 8-181 (2d ed. 1981). Rather, facts to support the conspiracy allegation must also be pleaded. *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) ("a bare bones statement of conspiracy . . . without any supporting facts permits dismissal.") In *Granville v. Hunt,* 411 F.2d 9 (5th Cir. 1969), the court dismissed a conspiracy complaint much like Plaintiffs' herein, explaining:

> *The appellant has failed to allege any facts showing either the existence or the execution of the claimed conspiracy.* The pleadings contain only *bare allegations* that the defendants conspired against the appellant and that as a result of this conspiracy, he was subjected to cruel and unusual punishment. These

> allegations contain mere bare bones and are totally without any fleshing to show a link between the alleged conspirators. They also fail 'to allege any overt acts related to the promotion of the claimed conspiracy.' . . . *Such pleading is clearly insufficient.* 'Although pleadings are given a liberal construction in the federal courts, the Rules contemplate some factual statement in support of the claim. General allegations of this kind unsupported by any factual statements have generally been rejected as insufficient.' . . . '[T]he complaint must do more than merely state vague and conclusionary allegations respecting the existence [and operation] of a conspiracy.'

Id. at 11 (citations omitted, emphasis added, and bracketed language in original).

Plaintiff's allegations against the NAAA were virtually identical to the allegations made against two other defendants, the PIO and the PCNA. Complaint at ¶ 60-62, App. IIA at 19-20. These other defendants did not even exist at the time of the March 11, 1978 bus incident, making allegations against them absurd and enhancing the belief of the NAAA that Plaintiffs lack any factual basis for their allegations and that the Plaintiffs' true motivation was to hamper the NAAA in its representation of Arab Americans.

Based on the Plaintiffs' failure to substitute their allegations of tortious conduct or of conspiracy, the District Court ruled that the allegations "are clearly insubstantial." As noted, the District Court also ruled that the NAAA, PCNA, and PIO "have not been connected to the claimed torts sufficiently to permit the action to proceed against them." App. IB at 124a, 125a. The District Court's dismissal of the action was affirmed *per curiam* by the Court of Appeals for the District of Columbia Circuit, and none

of the three concurring opinions questioned or disagreed with the insufficiency holding. As was the case with respect to the statute of limitations issue, Plaintiffs have not challenged the insufficiency issue in their Petition. Accordingly, this Court should affirm the clearly correct holdings below and decline to hear the petitioned issues.

Insofar as this Court might wish to hear the petitioned issues as pertaining to other defendants, the NAAA suggests that certiorari be granted only with respect to those other defendants. No justification exists for causing the NAAA to argue nebulous issues of jurisdictional and constitutional law when it has no connection whatsoever to the alleged incident.

3. The NAAA may not be held liable for Professor Sharabi's statements and associations.

As discussed above, Plaintiffs made no allegations of direct NAAA involvement in the bus incident. Instead, the record below made clear that the *only* basis for Plaintiff's claims against NAAA were allegations concerning the political views and associations of Professor Hisham Sharabi. These views and associations may not be the basis for NAAA liability for four reasons.

First, Professor Sharabi's alleged advocacy of violence was far too remote to justify liability. His alleged statements were made six years *before* and four months *after* the bus attack. This Court on at least three occasions has declined to impose liability for statements more immediate than Professor Sharabi's statements. *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) ("the constitutional guarantees of free speech and free press do not

permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Noto v. United States,* 367 U.S. 290 (1961); *Yates v. United States,* 354 U.S. 298, 321 (1957) (". . . advocacy [of forcible overthrow, with the intent to accomplish such overthrow], even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action . . . ."). Furthermore, Professor Sharabi's statements were made in a newspaper interview and in a scholarly journal. As such, they do not even remotely approach the kind of incitement for which the NAAA might conceivably be held liable.

Second, Plaintiffs' allegations mischaracterize Professor Sharabi's views. Plaintiffs' constant use of the emotionally charged word "genocide" obscures the fact that Professor Sharabi has not advoted removal of a *people* but of a *government*—the Zionist government. As was pointed out to the District Court, the full context of Professor Sharabi's statements demonstrates clearly that his goal is a joint democratic state allowing freedom for Jews, Muslims, and Christians alike. Reply Memorandum of NAAA in Support of Its Motion to Dismiss, App. IID at 222-26.

Third, Plaintiffs' suggestion that liability can be based solely upon the political or social views of persons with whom one associates is repugnant to basic First Amendment principles. The fact that Professor Sharabi allegedly associates with the PLO establishes no possible basis for civil liability. *See Healy v. James,* 408 U.S. 169, 185-86 (1972) (". . . it has been established that 'guilt by

association alone . . .' is an impermissible basis upon which to deny First Amendment rights," and ". . . the Court has consistently disapproved . . . denying rights and privileges solely because of a citizen's association with an unpopular organization."); *Sawyer v. Sandstrom,* 615 F.2d 311, 317 (5th Cir. 1980) ("knowing association with a group cannot be made a punishable act just because some of the group members are engaged in criminal conduct").

Fourth, even if Professor Sharabi's statements were not protected for the reasons discussed above, those statements cannot be the basis for liability *of the NAAA.* Plaintiffs have not alleged any facts which indicate that Professor Sharabi was an agent or spokesman for the NAAA. Professor Sharabi's statements were just that—statements of an *individual*—and cannot justify liability of an organization with which he happens to be associated.

Accordingly, this Court should reject Plaintiffs' blatant attempt to bootstrap their baseless charges against the NAAA. The fact that certain NAAA members may have spoken out in favor of Palestinian self-determination is irrelevant to the liability issues of this case. The District Court and the Court of Appeals accordingly were correct in dismissing Plaintiffs' claims.

4. The courts below properly dismissed Plaintiffs' Complaint for lack of federal question jurisdiction.

One of Plaintiffs alleged sources of jurisdiction was 28 U.S.C. § 1331 which provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United

States." The District Court ruled that Section 1331 did not provide Plaintiffs with a basis for jurisdiction, App. I at 123a, and the Court of Appeals referred to the holding of no subject matter jurisdiction in its *per curiam* affirmance, App. I at 3a. Furthermore, the two concurring opinions which referred to Section 1331 also rejected it as a jurisdictional base. App. I at 13a n.4 (Judge Edwards), 57a (Judge Bork).

Plaintiffs originally alleged that their claims "arose under" federal common law, eight statutes, and thirteen treaties of the United States. App. IB at 117a, 118a, 122a. Having lost on all these contentions in both of the courts below, the Plaintiffs have abandoned most of their original claims and now only allege that five treaties of the United States furnish federal question jurisdiction. Petition at 27, 28. As the courts below ruled, however, none of these five treaties provide any judicially enforceable rights.

A treaty is a contract between the United States and the other signatories of the treaty, and generally does *not* confer any *privately* enforceable rights unless Congress implements the treaty through legislation. When Congress has not implemented such a treaty, the treaty is "executory." *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *Diggs v. Richardson*, 555 F.2d 848, 850-51 (D.C. Cir. 1976); *Dreyfus v. von Finck*, 535 F.2d 24, 29-30 (2d. Cir.), *cert. denied*, 429 U.S. 835 (1976).

While no precise rule determines whether a particular treaty is or is not executory, courts have relied primarily upon two factors. First, if a treaty calls for each country to enact legislation concerning the treaty,

it universaliy is held to be executory and thus no private rights are conferred by it. *United States v. Postal,* 589 F.2d 862, 876-77 (5th Cir.) *cert. denied,* 444 U.S. 832 (1979). Second, courts look to the words of a treaty to determine whether it evidences an intent to confer judicially enforceable rights upon individuals or whether it addresses governmental actions. *Diggs v. Richardson,* 555 F.2d 848 (D.C. Cir. 1976).

Based on these factors, all of the treaties now cited by Plaintiffs are executory and accordingly do not provide a private cause of action. Two of these treaties, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War and the Geneva Convention Relative to the Treatment of Prisoners of War, expressly call for participating nations to enact implementing legislation. Motion, App. IIB at 123, 127. Additionally, one of these Geneva Conventions and the three other cited treaties have been judicially determined not to provide private rights of action. *Huynh Thi Anh v. Levi,* 586 F.2d 625, 629 (6th Cir. 1978) (Geneva Convention for the Protection of Civilian Persons in Time of War); *Pauling v. McElroy,* 164 F.Supp. 390, 393 (D.D.C.) *aff'd,* 278 F.2d 252 (D.C. Cir. 1958) (United Nations Charter); *Dreyfus v. von Finck,* 534 F.2d at 30 (Hague Conventions of 1899 and 1907). Accordingly, the District Court and Court of Appeals were clearly correct in ruling that the treaties cited by Plaintiffs do not provide privately enforceable rights. App. IB at 119a-122a (District Court); App. IA at 75a-78a (Court of Appeals, Judge Bork concurring).

Plaintiffs attempt to create a conflict among courts when none exists. They assert that denial of their rights of action conflicted with decisions of the Ninth Circuit

and of this Court. Petition at 27-29. The decisions which Plaintiffs cite merely elucidate the test just described for determining whether or not a treaty is executory. For instance, the language of the Ninth Circuit relied upon by Plaintiffs states that the determination is made "in each case by reference to many contextual factors" including "the existence of domestic procedures and institutions appropriate for direct implementation." *People of Saipan v. United States Department of Interior,* 502 F.2d 90 (1974), *cert. denied,* 420 U.S. 1003 (1975); quoted at Petition, p. 29. This is exactly the point which the NAAA wishes to make: based on a contextual analysis, the courts below were clearly correct in ruling that the treaties cited by the instant Plaintiffs do not provide private rights of action.

5. The courts below properly dismissed Plaintiffs' Complaint for lack of jurisdiction under the Alien Tort Statute.

The Alien Tort Statute, 28 U.S.C. § 1350, provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The District Court concluded that Section 1350 did not confer jurisdiction over the Plaintiffs' claim because Plaintiffs failed to demonstrate that any provision of international law they relied upon provides a privately enforceable cause of action. Plaintiffs object to the District Court's interpretation of Section 1350, stating that an alien may bring an action in federal court for violation of international law even if that law is not judicially enforceable. Petition at 14. The NAAA submits that Plain-

tiffs' interpretation leads to a result that cannot have been intended.

If an *American citizen* sues in federal court for violation of the law of nations or treaty, he must demonstrate under Section 1331 that the provision of international law which is relied upon is judicially enforceable. This is a heavy burden since, as noted, the general rule is that treaties are executory and not judicially enforceable absent implementing legislation. *See Diggs v. Richardson,* 555 F.2d at 850-51. Under Plaintiffs' interpretation, however, Section 1350 permits *aliens* far greater access to federal courts than United States citizens. Indeed, aliens would be able to sue in federal court merely by alleging violation of an American treaty, regardless of whether that treatry provides any judicially enforceable rights. The District Court correctly rejected that result and provided the rational interpretation that international law must provide a judicially enforceable right before Section 1350 jurisdiction may be established. This is entirely consistent with the Section 1350 case law which emphasizes that Section 1350 must be narrowly construed. *See, e.g., ITT v. Vencap Ltd.,* 519 F.2d 1001, 1015 (2d Cir. 1975).

Even if this Court were to disagree with District Court's interpretation of Section 1350, this Court would not need to hear the petitioned issues, for two reasons. First, the Petition obscures the fact that the District Court's interpretation of Section 1350 was *not* expressly adopted by the District of Columbia Court of Appeals. The opinion of the Court of Appeals merely "affirm[ed] the dismissal of this action" without any reference to Section 1350, App. I at 3a, and there had been two non-jurisdic-

tional reasons for dismissing the action against the NAAA —the statute of limitations and the lack of sufficiency of the allegations. Of the three concurring judges, only Judge Bork specifically agreed with the District Court's Section 1350 interpretation; Judge Edwards disagreed, App. IA at 8a-17a, and Judge Robb did not address the issue.

Second, even if the District Court's interpretation had been expressly adopted by the full panel of the Court of Appeals, the various conflicts among courts alleged by Plaintiffs would not exist. Plaintiffs claim that the decision below conflicts, *inter alia*, with the Second Circuit's decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980). Petition at 13, 16. Such a claim ignores the fact that the tort in *Filartiga* was committed by a government agent, whereas the tort in the instant case was not. The general rule is that the law of nations only imposes duties on states and not on individuals, J. Brierly, *The Law of Nation* 1 (6th ed. 1963); L. Henkin, R. Pugh, O. Schacter & H. Smit, *International Law* 246-47 (1980). Such an assumption was implicit throughout the *Filartiga* decision, wherein the defendant had been Inspector General of Police. 630 F.2d at 878. The holding was that "torture perpetrated *under color of official authority* violates . . . international law," *id.* (emphasis added), and the opinion made constant references to "a state's power" and obligations owed by "governments," *id.* at 881, 885. Here, however, "[t]he Palestine Liberation Organization is not a recognized state, and it does not act under color of any recognized state's law." App. IIA at 37a (Judge Edwards, concurring). *See also id.* at 68a (Judge Bork, concurring) ("[It] would appear the PLO is not a state."). Accordingly, under no circumstances can the ruling of

the Court of Appeals below be construed as conflicting with the Second Circuit's decision in *Filartiga*.

Plaintiffs also allege that the decisions below conflict with prior decision of this Court. They allege that the District of Columbia Court of Appeals "required unanimity of international opinion as a prerequisite to a finding that any act of a nation-state or its agent is in violation of international law," and that this supposed requirement conflicts with the "general assent" standard laid down by this Court in *The Paquete Habana*, 175 U.S. 677, 700 (1900). Petition at 12-13, 19. Our earlier discussion clearly demonstrated, however that both of the judges discussing the issue followed this "general assent" standard, and, indeed, that it was the lack of *any* consensus which led Judge Edwards to state that the instant acts did not violate international law.

In summary, the District Court's interpretation of Section 1350 was merely a rational restriction on the rights of aliens to sue in federal courts. Only one of the three judges of the Court of Appeals expressly adopted the District Court's interpretation, but even if the entire appellate court had adopted the requirement, neither a conflict with other Courts of Appeals nor a conflict with this Court would be present. Hearing of the petitioned issue accordingly is not justified.

6. The political question issue which the Plaintiffs have petitioned is not properly a part of the controversy presented to this Court, and accordingly review by this Court is not appropriate.

Plaintiffs have alleged that they were denied redress because of the political question doctrine. Petition at 23. Such an allegation fundamentally distorts the decisions

below. The political question doctrine was not among the many factors cited by the District Court in dismissing Plaintiffs' action. The *per curiam* Court of Appeals decision made no reference to the doctrine. Only *one* of the three Circuit Court Judges based his concurring opinion on the political question doctrine. Plaintiffs were not "denied redress" because of the political question doctrine; they were denied redress because their claims were barred by the statute of limitations, because their claims against the NAAA were insubstantial, and because they failed to establish federal jurisdiction. The political question doctrine is simply not part of the controversy presented to this Court, and accordingly hearing of the petitioned issue is not appropriate or justified.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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